

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 189

Issued by authority of the Minister for Sport

Australian Sports Anti-Doping Authority Act 2006

Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1)

The *Australian Sports Anti-Doping Authority Act 2006* (the Act) provides for the regulation of Australia's sports anti-doping arrangements. Those arrangements give effect to Australia's international obligations under the UNESCO International Convention Against Doping in Sport (the UNESCO Convention). Chiefly, the UNESCO Convention requires State Parties to implement arrangements that are consistent with the principles of the World Anti-Doping Code (the Code).

Section 79 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Australia's anti-doping framework comprises the Act, the *Australian Sports Anti-Doping Regulations 2006* (the Principal Regulations) and the National Anti-Doping (NAD) Scheme, as set out in Schedule 1 to the Principal Regulations. The Australian Sports Anti-Doping Authority (ASADA) is the focal point for the Australian Government's efforts against doping in sport.

The Australian Sports Anti-Doping Authority Amendment Regulation 2013 (the Regulation) implements the changes to Australia's anti-doping arrangements that are contained in the *Australian Sports Anti-Doping Authority Amendment Act 2013*.

Doping offences have traditionally been detected through the testing of blood and urine samples to identify the presence of a banned substance. However, well organised and systemic doping programs operate without detection by existing testing regimes. With doping becoming increasingly sophisticated, it is less likely that anti-doping rule violations will be detected through analytical testing alone.

Only through the application of investigative techniques and intelligence gathering, combined with an effective drug testing program, can ASADA effectively identify those athletes and athlete support personnel who are involved in sophisticated doping practices.

The Regulation enhances ASADA's investigations and intelligence gathering capacity. The Regulation specifies the framework in which the ASADA Chief Executive Officer (CEO) will be able to require someone to assist with an investigation. The CEO will be able to issue a notice (to be known as a disclosure notice) requiring a person to do one or more of the following: attend an interview to answer questions; give information; and/or produce documents or things.

The CEO does not have unfettered authority to issue a disclosure notice. The CEO can only issue a disclosure notice if they reasonably believe the person has information, documents or things that may be relevant to the administration of the NAD scheme. Furthermore, a disclosure notice may only be issued if three members of the Anti-Doping Rule Violation Panel (the Panel) agree in writing that the belief of the CEO is reasonable.

Key aspects of the issuing of the disclosure notice are specified in the Regulation, including the format and content of the disclosure notice; conduct of interviews; retaining and making copies of documents and the use of information gathered from the disclosure notice. The amended Regulations will also oblige ASADA to inform the person of their rights and the possible consequences for failing to comply with a disclosure notice. These rights include permitting an interviewee to have someone accompany them to the interview and not being required to answer questions that may incriminate or expose the person to penalty.

The Act provides for civil penalties to be determined by a court for failing to comply with a disclosure notice. The Regulation facilitates the operation of an infringement notice scheme. The infringement notice scheme will provide a means by which an infringement notice may be offered to a person who is alleged to have contravened a civil penalty provision under the Act, as an alternative to the matter being determined before a court.

The Regulation clarifies the roles and responsibilities of the Panel in relation to the anti-doping rule violation process and permits the CEO to disclose information relevant to the administration of the NAD scheme to the Australian Government department responsible for protecting the integrity of Australian sport. Currently, this is the National Integrity of Sport Unit within the Department of Regional Australia, Local Government, Arts and Sport.

Importantly, the national sporting organisation remains the final decision maker on whether an anti-doping rule violation has occurred and, if so, what sanction should be applied. There needs to be sufficient evidence to demonstrate that the person has committed a violation, in accordance with the levels of proof specified in the Code.

A number of technical issues are addressed in the Regulations, including:

- updating the Regulations to incorporate the ASADA (Operation of laws and references) Determination 2009; and
- removing the link between the entitlements of the CEO and those of the Chief Executive Officer of the Crime Commission. This is no longer required as the Remuneration Tribunal has determined the salary and allowances of the CEO.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commenced on 1 August 2013.

**Details of the Australian Sports Anti-Doping Authority Regulation
2013 (No. 1)**

Regulation 1 – Name of Regulation

This item provides for the Regulation to be referred to as the Australian Sports Anti-Doping Authority Amendment Regulation 2013 (No. 1).

Regulation 2 – Commencement

This item commences on 1 August 2013.

Regulation 3 – Authority

The *Australian Sports Anti-Doping Authority Act 2006* provides for the making of this regulation.

Regulation 4 – Schedules

Schedule 1 – Amendments

Australian Sports Anti-Doping Authority Regulations 2006

Item [1] – Regulation 1A

This Item defines an authorised person in relation to an infringement notice.

Item [2] – At the end of Regulation 5A

This Item provides for ASADA to pass personal information collected from the NAD scheme to the Australian Government Department responsible for administering the Act, which has the responsibility in respect of protecting the integrity of sport. Currently, this is the National Integrity of Sport Unit in the Department of Regional Australia, Local Government, Arts and Sport.

Item [3] – At the end of Regulation 5B

This Item provides for ASADA to pass contract services personal information collected from the NAD scheme to the Australian Government Department responsible for administering the Act and which also responsibilities in relation to protecting the integrity of sport. Currently, this is the National Integrity of Sport Unit within the Department of Regional Australia, Local Government, Arts and Sport.

Item [4] – Regulation 13

The remuneration for the CEO is determined by the Remuneration Tribunal. This Item provides for the CEO to receive allowances determined by the Tribunal.

Item [5] – After Part 4

An infringement notice is a notice of a civil penalty imposed on a person by setting out particulars of an alleged failure to comply with a disclosure notice. It gives the person to whom the notice is issued the option of either paying the penalty set out in the notice to expiate the offence or electing to have the matter dealt with by a court.

This regulation inserts a new Part 5 to provide for the operation of an infringement notice scheme to deal with non-compliance with a disclosure notice where appropriate, as an alternative to legal proceedings.

Part 5 contains Regulations 16-23.

Regulation 16 provides an outline of the operation of the infringement notice process.

Regulation 17 allows the CEO to authorise others to give infringement notices, for other purposes relating to an infringement notice or for the administration of infringement notices.

Regulation 18 gives an authorised person the discretion to issue an infringement notice where there are reasonable grounds to believe a person has contravened a civil penalty provision under the Act.

A separate infringement notice must be issued for each alleged contravention, unless the contravention relates to an obligation to do something within a particular period or before a particular time in which case, the multiple contraventions constituted by the ongoing failure or refusal to comply on more than one day may be set out in a single infringement notice covering all of the civil penalties imposed.

Sub-regulation 19(1) specifies a range of matters that must be included in each infringement notice. This includes a statement that if the infringement notice is paid within 28 days of it being issued, it does not constitute an admission of guilt or liability but precludes any further liability related to the alleged contravention (unless the notice is subsequently withdrawn).

Sub-regulation 19(2) limits the amount payable under an infringement notice to no more than one-fifth of the penalty that a court could impose in relation to the alleged contravention. This provides a person who accepts that a civil penalty provision was contravened to have it dealt with without a court process.

Regulation 20 allows a person who has received an infringement notice to apply to the CEO for one or more extensions of time to pay the infringement notice. An extension of time is at the discretion of the CEO and may take account of any relevant factors, for example, the time allowed to pay would cause undue hardship.

Regulation 21 sets out processes for withdrawing infringement notices and provides guidance as to the information the relevant chief executive must disclose and may take into account in considering whether to withdraw an infringement notice.

If the notice is withdrawn after the penalty has been paid the amount paid must be refunded. A person may apply for a notice to be withdrawn.

Sub-regulation 22(1) ensures that paying an infringement notice discharges all liability for the alleged contravention, without constituting an admission of guilt. However, sub-regulation 22(1) does not apply if the notice is subsequently withdrawn and the amount refunded.

Regulation 23 clarifies that the discretion to issue an infringement notice does not make the notice a mandatory response to an alleged contravention of a civil penalty provision and does not limit the option to take action in other ways. Part 5 does not affect liability for a civil penalty provision if a person does not comply with a notice, is not given a notice or a notice is withdrawn.

Part 5 does not prevent multiple notices being issued for an alleged contravention and does not limit a court's discretion to determine a penalty for a person who is found to have contravened a civil penalty provision.

Item [6] – After clause 1.02 of Schedule 1

This Item authorises the CEO to assist a sport by providing information in relation to a possible anti-doping rule violation to sporting administration bodies. The CEO may also make a recommendation about the possible consequences of committing an anti-doping rule violation. The CEO is able to provide information to sport tribunals and the Court of Arbitration for Sport.

The final decision on whether an anti-doping rule violation has been committed and the consequence for a committing a violation rests with the sport, in accordance with its anti-doping policy. Consequences usually include a ban from participating in sport for a period of time. In Australia, breaches of anti-doping rules do not attract criminal penalties.

Item [7] – Paragraph 1.03A(1)(e) of Schedule 1

Item [8] – Paragraph 2.04(m) of Schedule 1

These Items remove the role of the Anti-Doping Rule Violation Panel to make recommendations about the possible consequences (the sanction) of a possible anti-doping rule violation.

Item [9] – After Division 3.4 of Schedule 1

This Item inserts new Divisions 3.4A and 3.4B, setting out the requirements for the CEO to issue a disclosure notice requiring a person to assist ASADA with its investigations.

New clause 3.26A of Division 3.4A highlights that the CEO can, in the first instance, request a person to attend an interview, give information and/or produce a document or thing. This provision offers the prospect of people assisting ASADA if asked, without the need for the CEO to resort to the disclosure notice. There are no penalties for not complying with a request.

Importantly, this clause does not limit ASADA's authority under paragraph 13(1)(f) of the Act to investigate possible violations of the anti-doping rules. New clause 3.26A does not prevent an ASADA investigator from asking questions, obtaining information or requesting documents or things in the course of their daily activities. It provides an option for the CEO to request assistance on a matter before requiring formally that assistance.

New clause 3.26B of Division 3.4B authorises the CEO to issue a disclosure notice to a person requiring that person to do one or more of the following: answer questions at an interview; give information and/or produce documents or things.

New sub-clause 3.26B(2) requires that, before issuing a disclosure notice, the CEO must have a reasonable belief that the person has information documents or things that may be relevant to the administration of the NAD scheme. New paragraph 3.26B(2)(a) requires the CEO to declare that belief in writing.

New paragraph 3.26B(2)(b) sets out the circumstances in which a registered medical practitioner may be issued with a disclosure notice. ASADA can only seek information, documents or things from someone in their capacity as a medical practitioner where the CEO has a reasonable belief that the medical practitioner is involved in the commission or attempted commission of an anti-doping rule violation.

Under new paragraph 3.26B(2)(c), the CEO must obtain the written agreement of three members of the Anti-Doping Rule Violation Panel (the Panel) that the CEO's belief, as set out in paragraphs 3.26B(2)(a) and, if applicable 3.26B(2)(b), is reasonable.

Under new sub-clause 3.26B(3), a person who is issued with a disclosure notice has a right to be advised of the possible consequences for failing to comply with the notice. This is reflected in the notice requirements at paragraph 3.26B(5)(c).

New sub-clause 3.26B(4) recognises that disclosure notices may be made and given electronically. New sub-clauses 3.26B(5), 3.26B(6) and 3.26B(7) set out what must be included on a disclosure notice. New sub-clause 3.26B(5) specifies the details common to all notices issued by the CEO.

New sub-clause 3.26B(6) deals with a disclosure notice requiring a person to attend an interview and answer questions. It provides that the disclosure notice must include a date, time and location of an interview. It also outlines a process by which the interviewee is able to seek alternative arrangements if the arrangement causes undue hardship. The CEO may consider the details of the hardship raised by the interviewee and whether it warrants re-scheduling the interview.

The final decision on interview arrangements however, rests with the CEO.

The recipient of the disclosure notice should be advised that the interview must take place at least 14 days after the date of the notice except if exceptional circumstances apply. The process for the CEO to determine whether exceptional circumstances apply is specified at clause 3.26D. The CEO is required to seek the agreement of the Panel that there are exceptional circumstances. It is envisaged that routine interviews, free of imperatives requiring earlier action will take place at least fourteen days from the issue of a notice. Circumstances may, however, give rise to a need to proceed more quickly. For example, it may be important to obtain information before a person leaves the country for an international competition. A shorter notice period may also be necessary where there are concerns about serious health issues arising from doping.

Other information that should be provided in the disclosure notice includes a statement that:

- the interview may be conducted over more than one day, if required [new paragraph 3.26B(6)(d)];
- the person must attend an interview [new paragraph 3.26B(6)(e)];
- the person does not have to answer a question at interview if it might tend to incriminate the person or expose the person to penalty [new paragraph 3.26B(6)(f)]; and
- the recipient of the disclosure notice may be accompanied at the interview [new paragraphs 3.26B(6)(g) and 3.26B(6)(h)].

The disclosure notice must advise all recipients, regardless of whether they are over or under the age of 18 that they need to advise the CEO if they propose to be accompanied by a person other than a legal representative at the interview.

Suspending an interview and reconvening for any other reason does not stop the continuity of the interview. The “interview” conducted under a notice is a single ongoing event and the interviewee must attend all of it.

New sub-clause 3.26B(7) authorises the CEO to issue a replacement disclosure notice if the CEO agrees to a different date, time and location under sub-clause 3.26B(6). The replacement disclosure notice may be issued without reference to the Panel

members mentioned in paragraph 3.26B(2)(c) and the interview may be scheduled for a date earlier than the fourteen days from the date of the replacement disclosure notice.

New sub-clause 3.26B(8) deals with a disclosure notice that requires a person to provide information. It provides that the disclosure notice must nominate the date and/or time the information must be provided. Under new paragraph 3.26B(8)(b), the disclosure notice must also include a statement that the person does not have to provide the required information if it might tend to incriminate the person or expose the person to penalty. Under paragraphs 3.26B(8)(c) and 3.26B(8)(d), the disclosure notice also needs to include a statement that, if the recipient does not possess the required information and has taken all reasonable steps to obtain the required information, the recipient may give the CEO a statutory declaration stating this.

Under new sub-clause 3.26B(9), a disclosure notice that requires a person to produce a document or thing must set out certain information about the person's rights and obligations. Information to be provided in the disclosure notice include statements that:

- the recipient must produce the documents or things by the date and time specified in the disclosure notice [new paragraph 3.26B(9)(a)];
- the recipient is not excused from producing a document or thing that might tend to incriminate the person or expose the person to penalty [new paragraph 3.26B(9)(b)];
- if the recipient does not possess the document or thing and has taken all reasonable steps to obtain the required information but was not able to do so, the recipient may give the CEO a statutory declaration stating this [new paragraph 3.26B(9)(c)]; and
- any information, document or thing obtained as a direct or indirect consequence of producing the document or thing is inadmissible as evidence against the person in criminal proceedings [except an offence against section 137.1 (false or misleading information) or 137.2 (false or misleading documents) of the Criminal Code] and other proceedings that would expose the person to penalty other than proceedings in connection with the Act or the ASADA Regulations [paragraph 3.26B(9)(d)].

New paragraph 3.26B(9)(e) confirms that any information, document or thing obtained through the issuing of a disclosure note may be used in proceedings before a sporting administration body or the Court of Arbitration for Sport.

Giving the CEO the statutory declaration referenced in paragraphs 3.26B(8)(c), 3.26B(8)(d) and 3.26B(9)(c) gives effect to paragraph 13(C)(2) of the Act. A person will be considered not to have contravened the civil penalty provision if they do not possess the information, document or thing required by the disclosure notice, have taken reasonable steps to obtain it and provided a statutory declaration confirming this to be the case.

New clause 3.26C of Division 3.4B set out the form and conduct of interview required under a disclosure notice. New paragraph 3.26C(2) allows an interview or to arrange for interview to be conducted in person or by teleconference or videoconference while new paragraph 3.26C(3) allows an interview to be recorded.

New paragraphs 3.26C(4), 3.26C(5) and 3.26C(6) sets the arrangements around allowing an interviewee to be accompanied at an interview.

New paragraph 3.26C(4) provides that an interviewee over the age of 18 years may be accompanied by one person. New paragraph 3.26C(4) provides an additional protection for an interviewee under the age of 18 years by allowing the interviewee to have up to two people accompanying them to an interview. Where one of the people is a qualified legal practitioner, the interviewee can also be accompanied by a parent, guardian or other appropriate person.

New paragraphs 3.26C(5) requires the interviewee to notify the CEO of the identity of any person proposed to accompany them to the interview unless the accompanying person is a legal representative. If the interviewee does not notify the CEO of the identified person within the time specified in the disclosure notice, the interviewer may decide whether to allow the interviewee to be accompanied by that person at the interview. This enables ASADA to consider whether the presence of that person may compromise, hinder or obstruct an investigation (see below).

New paragraph 3.26C(6) provides that the CEO (or interviewer) can refuse to allow someone, through the duration of the interview process, to accompany the interviewee at an interview if the CEO has a reasonable belief that the presence of that person may compromise, hinder or obstruct an ASADA investigation. Examples of the possible grounds for refusing someone to attend an interview are listed in at the end of that paragraph.

The intent of this paragraph is to protect the interviewee and the integrity of the interview. It aims to avoid a situation where, for example, a person may be convinced to bring a coach, team-mate or support person along to an interview when that person is involved in an anti-doping investigation. It may compromise the integrity of the investigation process for such a person to be involved in the interview.

If the interviewee advises the identity of the person proposed to accompany them to their interview within the time specified in the disclosure notice, then, should that person be refused entry to the interview, the interviewee will have the opportunity to arrange for someone else to accompany them to the interview. There is also a provision to suspend the interview until the interviewee has arranged for someone else to attend. A suspension might be required for interviews conducted in exceptional circumstances where the notice may not have left sufficient time prior to the interview to notify the CEO of the identity of the person proposed to accompany the interviewee.

New paragraph 3.26C(7) confirms that a recipient of a disclosure notice is not entitled to recover any costs relating to the disclosure note from the Commonwealth.

New sub-clause 3.26D makes provision for circumstances that may require the CEO to authorise the interview earlier than the normal 14 days from the issuing of a disclosure notice. For example, it may be the case that the person is about to leave Australia for an international competition or training. The CEO may also consider it to be an exceptional circumstance if the CEO believes that a person is at risk of serious health issues as a result of the alleged use of a substance.

New paragraph 3.26D(1) requires the CEO to consult with the Panel members on whether there are exceptional circumstances such that the CEO can require an interview within 14 days of the date of the disclosure notice. New paragraph 3.26D(2) requires the Panel members to advise whether they agree that the exceptional circumstances are established.

New sub-clause 3.26E of Division 3.4B specifies that, if the CEO has taken possession of a document or thing, it will be returned to the person as soon as it is practicable after the CEO no longer needs to retain possession of the document.

Item [10] – Paragraph 4.07A(3)(e) of Schedule 1

This Item removes the requirement to inform the person who is the subject of a possible non-analytical anti-doping rule violation that the Panel can make recommendations on the possible consequences of the violation.

Item [11] –At the end of Part 4 of Schedule 1

This Item inserts a new Division 4.5 that confirms an action against an athlete or support person must commence within eight years of the date the violation is alleged to have occurred.

Schedule 2 – Further Amendments

Australian Sports Anti-Doping Authority Regulations 2006

The primary purpose of Schedule 2 is to embody in the Principal Regulations the operation of Item 130 of Schedule 1 to the Act and the ASADA (Operation of laws and references) Determination 2009 (the Determination).

The Act was amended in 2009 to vary ASADA's governance and structure. These amendments, which commenced on 1 January 2010, included establishing ASADA as an agency subject to the *Financial Management and Accountability Act 1997* and the establishment of the CEO's position, an advisory group for the CEO and the Panel.

Item 130 of Schedule 1 to the Act provides that if, before the commencement time (1 January 2010), a thing was done by, or in relation to ASADA or the ASADA members, then, for the purposes of the operation of any law after the commencement time, the thing is taken to have been done by, or in relation to, the CEO.

The Act allows for exceptions to this provision to be specified in a determination. Consistent with sub-Item 130(3) of Schedule 1 to the Act, the Determination specifies when a reference to the CEO is a reference to the Panel. The Determination was issued on 14 December 2009 and provided for the interpretation of terms in Instruments made before 1 January 2010 which contain references to ASADA and the ASADA members.

- Item [1] Subparagraph 5(1)(a)(ii)
- Item [2] Subregulation 5(2)
- Item [3] Subregulation 5(3)
- Item [4] Subregulation 5A(2)
- Item [5] Subregulation 5B(2)
- Item [6] Paragraph 6(2)(b)
- Item [7] Subclause 1.02(1) of Schedule 1 (heading)
- Item [8] Subclause 1.02(1) of Schedule 1
- Item [9] Subclause 1.02(1) of Schedule 1
- Item [10] Paragraph 1.02(1)(e) of Schedule 1
- Item [11] Paragraph 1.02(1)(g) of Schedule 1
- Item [12] Subclause 1.02(2) of Schedule 1
- Item [13] Subclause 1.02(3) of Schedule 1

- Item [14] Clause 1.03 of Schedule 1 (heading)
- Item [15] Subclause 1.03(1) of Schedule 1
- Item [16] Subclause 1.03(2) of Schedule 1
- Item [17] Subclause 1.03(2) of Schedule 1
- Item [18] Subclause 1.03(2) of Schedule 1
- Item [19] Subclause 1.03(2) of Schedule 1
- Item [20] Clause 1.03B of Schedule 1 (heading)

These amendments incorporate the operation of Item 130 of Schedule 1 to the Act and the Determination into the wording of the Regulations.

- Item [21] Subclause 1.04A(2) of Schedule 1

This Regulation confirms that the first action in relation to an anti-doping rule violation under the NAD scheme must be commenced within 8 years after the alleged violation occurring.

- Item [22] Clause 1.05 of Schedule 1 (definition of blood collection official)
- Item [23] Clause 1.05 of Schedule 1 (paragraph (a) of the definition of chaperone)
- Item [24] Clause 1.05 of Schedule 1 (definition of domestic testing pool)
- Item [25] Clause 1.05 of Schedule 1 (definition of doping control officer)
- Item [26] Clause 1.05 of Schedule 1 (definition of investigator)
- Item [27] Clause 1.05 of Schedule 1 (definition of national-level athlete)
- Item [28] Clause 1.05 of Schedule 1 (definition of Register of Findings)
- Item [29] Clause 1.05 of Schedule 1 (definition of sporting tribunal)
- Item [30] Subclause 1.06(2) of Schedule 1
- Item [31] Subclause 1.06(3) of Schedule 1
- Item [32] Subclause 1.06(4) of Schedule 1
- Item [33] Subclause 1.08(2) of Schedule 1
- Item [34] Clause 2.03 of Schedule 1 (heading)
- Item [35] Subclause 2.03(2) of Schedule 1
- Item [36] Paragraph 2.04(b) of Schedule 1

- Item [37] Paragraph 2.04(d) of Schedule 1
- Item [38] Paragraph 2.04(e) of Schedule 1
- Item [39] Paragraph 2.04(f) of Schedule 1
- Item [40] Paragraph 2.04(h) of Schedule 1
- Item [41] Paragraph 2.04(i) of Schedule 1
- Item [42] Paragraph 2.04(j) of Schedule 1
- Item [43] Paragraph 2.04(k) of Schedule 1
- Item [44] Paragraph 2.04(l) of Schedule 1
- Item [45] Paragraph 2.04(n) of Schedule 1
- Item [46] Paragraph 2.04(o) of Schedule 1
- Item [47] Paragraph 2.04(p) of Schedule 1
- Item [48] Clause 3.01 of Schedule 1
- Item [49] Clause 3.01 of Schedule 1
- Item [50] Subclause 3.02(1) of Schedule 1
- Item [51] Subclause 3.02(1) of Schedule 1
- Item [52] Clause 3.03 of Schedule 1
- Item [53] Clause 3.03 of Schedule 1
- Item [54] Subclause 3.04(1) of Schedule 1
- Item [55] Subclause 3.04(1) of Schedule 1
- Item [56] Subclause 3.06(1) of Schedule 1
- Item [57] Subclause 3.06(4) of Schedule 1
- Item [58] Subclause 3.08(1) of Schedule 1
- Item [59] Subclause 3.08(1) of Schedule 1
- Item [60] Subclause 3.08(1) of Schedule 1
- Item [61] Subclause 3.08(2) of Schedule 1
- Item [62] Subclause 3.08(2) of Schedule 1
- Item [63] Subclause 3.09(1) of Schedule 1

- Item [64] Subclause 3.09(1) of Schedule 1
- Item [65] Paragraph 3.09(2)(b) of Schedule 1
- Item [66] Paragraph 3.09(2)(c) of Schedule 1
- Item [67] Subclause 3.09(2) of Schedule 1 (note)
- Item [68] Paragraph 3.09(3) of Schedule 1
- Item [69] Subclause 3.09(4) of Schedule 1 (note)
- Item [70] Paragraph 3.09(4)(b) of Schedule 1
- Item [71] Paragraph 3.09(4)(c) of Schedule 1
- Item [72] Paragraph 3.09(4)(d) of Schedule 1
- Item [73] Paragraph 3.09(5)(a) of Schedule 1
- Item [74] Paragraph 3.09(5)(b) of Schedule 1
- Item [75] Subclause 3.09(6) of Schedule 1
- Item [76] Paragraph 3.09(6)(b) of Schedule 1
- Item [77] Subparagraph 3.09(6)(b)(iii) of Schedule 1
- Item [78] Subsection 3.10(1) of Schedule 1
- Item [79] Paragraph 3.10(2)(b) of Schedule 1
- Item [80] Paragraph 3.10(2)(c) of Schedule 1
- Item [81] Subclause 3.10(2) of Schedule 1 (note)
- Item [82] Subclause 3.10(3) of Schedule 1
- Item [83] Paragraph 3.10(3)(b) of Schedule 1
- Item [84] Paragraph 3.10(3)(c) of Schedule 1
- Item [85] Paragraph 3.10(3)(d) of Schedule 1
- Item [86] Paragraph 3.10(4)(a) of Schedule 1
- Item [87] Paragraph 3.10(4)(b) of Schedule 1
- Item [88] Clause 3.11 of Schedule 1 (heading)
- Item [89] Clause 3.11 of Schedule 1
- Item [90] Subclause 3.11(4) of Schedule 1 (note)

- Item [91] Subclause 3.12(2) of Schedule 1
- Item [92] Subclause 3.12(3) of Schedule 1
- Item [93] Clause 3.14 of Schedule 1 (heading)
- Item [94] Subclause 3.14(1) of Schedule 1
- Item [95] Subclause 3.14(2) of Schedule 1
- Item [96] Subclause 3.14(3) of Schedule 1
- Item [97] Subclause 3.14(4) of Schedule 1
- Item [98] Clause 3.15 of Schedule 1 (heading)
- Item [99] Clause 3.15 of Schedule 1
- Item [100] Subclause 3.16(2) of Schedule 1 (note)
- Item [101] Subclause 3.16(8) of Schedule 1
- Item [102] Subclause 3.16 (9) of Schedule 1 (definition of *requester*)
- Item [103] Clause 3.17 of Schedule 1 (heading)
- Item [104] Clause 3.18 of Schedule 1 (heading)
- Item [105] Subclause 3.18(2) of Schedule 1
- Item [106] Subclause 3.18(3) of Schedule 1
- Item [107] Subclause 3.19(2) of Schedule 1
- Item [108] Subclause 3.19(3) of Schedule 1
- Item [109] Clause 3.22 of Schedule 1 (heading)
- Item [110] Subclause 3.22(2) of Schedule 1
- Item [111] Clause 3.23 of Schedule 1 (heading)
- Item [112] Paragraph 3.23(1)(b) of Schedule 1
- Item [113] Subclause 3.23(2) of Schedule 1
- Item [114] Paragraph 3.25(1)(a) of Schedule 1
- Item [115] Subclause 3.25(3) of Schedule 1
- Item [116] Subclause 3.25(4) of Schedule 1
- Item [117] Subclause 3.25(5) of Schedule 1
- Item [118] Subclause 3.26(1) of Schedule 1

- Item [119] Subclause 3.26(2) of Schedule 1
- Item [120] Subclause 3.27(1) of Schedule 1
- Item [121] Subclause 4.01(1) of Schedule 1
- Item [122] Subclause 4.01(2) of Schedule 1
- Item [123] Subclause 4.01(3) of Schedule 1
- Item [124] Subclause 4.01(4) of Schedule 1
- Item [125] Subclause 4.02(1) of Schedule 1
- Item [126] Subclause 4.02(2) of Schedule 1
- Item [127] Subclause 4.02(3) of Schedule 1
- Item [128] Subclause 4.02(3) of Schedule 1
- Item [129] Subclause 4.02(4) of Schedule 1
- Item [130] Subclause 4.02(5) of Schedule 1
- Item [131] Subclause 4.03(1) of Schedule 1
- Item [132] Subclause 4.03(2) of Schedule 1
- Item [133] Subclause 4.03(2) of Schedule 1
- Item [134] Subclause 4.03(3) of Schedule 1
- Item [135] Subclause 4.03(4) of Schedule 1
- Item [136] Subclause 4.04(1) of Schedule 1
- Item [137] Subclause 4.04(2) of Schedule 1
- Item [138] Paragraph 4.04(2)(d) of Schedule 1
- Item [139] Paragraph 4.05(1)(b) of Schedule 1
- Item [140] Subclause 4.05(4) of Schedule 1
- Item [141] Subclause 4.05(5) of Schedule 1
- Item [142] Paragraph 4.06(1)(b) of Schedule 1
- Item [143] Subclause 4.06(2) of Schedule 1
- Item [144] Paragraph 4.06(2)(b) of Schedule 1
- Item [145] Paragraph 4.06(2)(c) of Schedule 1
- Item [146] Paragraph 4.06(2)(d) of Schedule 1

- Item [147] Paragraph 4.06(2)(f) of Schedule 1
- Item [148] Paragraph 4.06(3)(b) of Schedule 1
- Item [149] Paragraph 4.06(3)(c) of Schedule 1
- Item [150] Paragraph 4.07A(3)(g) of Schedule 1
- Item [151] Clause 4.08 of Schedule 1
- Item [152] Subclause 4.11(1) of Schedule 1
- Item [153] Paragraph 4.11(1)(c) of Schedule 1
- Item [154] Paragraph 4.11(1)(d) of Schedule 1
- Item [155] Paragraph 4.11(2)(a) of Schedule 1
- Item [156] Clause 4.12 of Schedule 1
- Item [157] Subclause 4.13(1) of Schedule 1
- Item [158] Paragraph 4.13(1)(b) of Schedule 1
- Item [159] Subclause 4.13(2) of Schedule 1
- Item [160] Subclause 4.13(3) of Schedule 1
- Item [161] Clause 4.14 of Schedule 1
- Item [162] Paragraph 4.15(1)(a) of Schedule 1
- Item [163] Paragraph 4.15(1)(b) of Schedule 1
- Item [164] Subclause 4.15(2) of Schedule 1
- Item [165] Clause 4.16 of Schedule 1
- Item [166] Subclause 4.17(1) of Schedule 1
- Item [167] Subclause 4.17(2) of Schedule 1
- Item [168] Subclause 4.17(4) of Schedule 1
- Item [169] Subclause 4.18(1) of Schedule 1
- Item [170] Subclause 4.19(1) of Schedule 1
- Item [171] Subclause 4.19(2) of Schedule 1
- Item [172] Subclause 4.20(1) of Schedule 1
- Item [173] Subclause 4.20(1) of Schedule 1
- Item [174] Paragraph 4.20(1)(a) of Schedule 1

- Item [175] Subclause 4.20(2) of Schedule 1
- Item [176] Subclause 4.21(2) of Schedule 1
- Item [177] Subclause 4.21(3) of Schedule 1
- Item [178] Subclause 4.21(4) of Schedule 1
- Item [179] Paragraph 4.21(4)(c) of Schedule 1
- Item [180] Subclause 4.22(1) of Schedule 1
- Item [181] Paragraph 4.22(1)(a) of Schedule 1
- Item [182] Subclause 4.22(2) of Schedule 1
- Item [183] Subclause 5.01(6) of Schedule 1
- Item [184] Subclause 5.01(7) of Schedule 1
- Item [185] Subclause 5.01(7) of Schedule 1
- Item [186] Paragraph 5.02(1)(b) of Schedule 1
- Item [187] Paragraph 5.02(2)(b) of Schedule 1
- Item [188] Subclause 6.01(1) of Schedule 1
- Item [189] Subclause 6.01(2) of Schedule 1
- Item [190] Paragraph 6.01(2)(b) of Schedule 1
- Item [191] Paragraph 6.01(2)(c) of Schedule 1
- Item [192] Paragraph 6.01(2)(d) of Schedule 1
- Item [193] Paragraph 6.01(3)(b) of Schedule 1
- Item [194] Subclause 6.03(1) of Schedule 1
- Item [195] Subclause 6.03(2) of Schedule 1
- Item [196] Subclause 6.03(3) of Schedule 1
- Item [197] Subclause 6.01(4) of Schedule 1

These amendments incorporate the operation of Item 130 of Schedule 1 to the Act and the Determination into the wording of the Regulations.

Statement of Compatibility with Human Rights

Australian Sports Anti-Doping Authority Amendment Regulation 2013

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulations

This regulation amends the Australian Sports Anti-Doping Authority Regulations 2006 (the ASADA Regulations) to give effect to the amendments contained in the *Australian Sports Anti-Doping Authority Amendment Act 2013* (the Amendment Act) which received Royal Assent on 29 June 2013.

The Australian Government's anti-doping arrangements give effect to Australia's international obligations under the UNESCO International Convention Against Doping in Sport (the UNESCO Convention). Chiefly, the UNESCO Convention requires States Parties to implement arrangements that are consistent with the principles of the World Anti-Doping Code (the Code).

The Australian Sports Anti-Doping Authority (ASADA) is the Australian Government agency responsible for protecting Australia's sporting integrity through the elimination of doping and the implementation of the Code in Australia. ASADA's powers and functions are specified under the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act) and the ASADA regulations. The National Anti-Doping (NAD) Scheme is set out in the ASADA Regulations. The NAD scheme underpins ASADA's implementation of a co-ordinated Code-compliant anti-doping program encompassing deterrence, detection and the management of cases involving possible breaches of anti-doping rules.

As a condition of receiving Australian Government funding, Australia's national sporting organisations (NSOs) are required to have in place an anti-doping policy that complies with the Code as well as acknowledging ASADA's powers and functions under the ASADA Act and NAD scheme. All NSO anti-doping policies replicate the essential parts of the Code, such as the eight actions that constitute an anti-doping rule violation. The NSOs are ultimately responsible for imposing penalties for doping. Penalties (sanctions) for doping offences include bans from sport for a certain period, loss of titles and, possibly, the repayment of funds an athlete received when they were doping.

Anti-doping authorities have historically focused on the testing of samples (urine and blood) to detect the presence of prohibited substances in an athlete's body. Increasingly however, anti-doping rule violations cannot be detected through testing alone but, rather, require the collection of information/evidence.

Given this, the advances in doping practices and the emergence of sophisticated and systemic doping programs, the approach to detecting doping is changing from one being based solely on the identification of prohibited substances and methods through

testing to developing the capacity to undertake non-analytical detection programs (investigations and intelligence gathering).

This Regulation enhances ASADA's investigations and intelligence gathering capacity so that it is better placed to address the challenges faced by doping in sport.

Sections 13 and 13A of the ASADA Act requires that the NAD scheme must do certain things relevant to the investigation process. Consistent with the requirements of the ASADA Act, the Regulation amends to NAD Scheme to specify the framework in which the ASADA Chief Executive Officer (CEO) will be able to require someone to assist with an investigation. The CEO will be able to issue a notice (to be known as a disclosure notice) under Item 9, Schedule 1 of the Regulation, requiring a person to do one or more of the following: attend an interview to answer questions; give information; and/or produce documents or things.

Section 13C of the ASADA Act provides civil penalties for failing to comply with a disclosure notice, by failing to attend an interview, answer questions, give information or produce documents or things. Any civil penalty to be imposed on a person who is alleged to have failed to comply with a notice may be determined by a relevant court, under section 73B of the ASADA Act.

The Regulation includes an infringement notice scheme, contemplated in section 80 of the ASADA Act. Item 5, Schedule 1 to the Regulation permits the CEO to issue an infringement notice to a person who is alleged to have failed to comply with a disclosure notice, for an amount which is no more than one-fifth of the civil penalty that a court could impose. The person alleged to have breached the civil penalty provision can choose to pay the amount in the infringement notice or to have the matter determined by a court pursuant to the ASADA Act.

The Regulation also clarifies some of the roles and responsibilities of the Anti-Doping Rule Violation Panel (the Panel) established under section 40 of the ASADA Act in relation to the anti-doping rule violation process. The Regulation also permits the CEO to disclose information relevant to the administration of the NAD scheme to the Australian Government department working to help protect the integrity of Australian sport. Currently, this is the National Integrity of Sport Unit within the Department of Regional Australia, Local Government, Arts and Sport.

Subsection 24D of the ASADA Act makes provision for the remuneration and allowances of the CEO, including that prescribed in certain circumstances. As the CEO's remuneration and allowances are now determined by the Remuneration Tribunal, Item 4 of Schedule 1 to the Regulation repeals the existing regulation 13 of the ASADA Regulations and prescribes any allowances that a Remuneration Tribunal determination applies to the CEO and that are in operation.

Item 11 of Schedule 1 to the Regulation gives effect to subsections 13(3) and 13(4) of the ASADA Act, which require the NAD Scheme to include an 8 year limitation period for commencing action against an athlete or a support person in relation to a possible violation of the anti-doping rules.

Human Rights Implications

The Regulation may engage the following rights:

- Article 15.1 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) – right to take part in cultural life.
- Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) – right to protection from arbitrary or unlawful interferences with privacy, family, home or correspondence.
- Article 14(1) of the ICCPR – the right to a fair trial.
- Article 14(3) of the ICCPR – right to be free from self-incrimination.
- Article 14(2) of the ICCPR – right to the presumption of innocence.

Right to take part in cultural life

Article 15 of ICESCR protects the right of all persons to take part in cultural life and to enjoy the benefits of scientific progress and its applications. The United Nations Committee on Economic, Social and Cultural Rights (General Comment 21, 2009) has stated that culture encompasses:

“ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions.”

Sport is an integral element of culture in Australia. Sport is accessible to and embraced by millions of Australians, whether it is as participants, supporters or employees of businesses who service the sports sector.

Most Australians participate in or support sports in the belief that it is free from doping. The ASADA Act and the ASADA Regulations promote the cultural rights under Article 15 of the ICESCR by assisting to protect the integrity of sport in Australia, and their place in competition internationally. Our anti-doping arrangements are implemented to protect the rights of the vast majority of Australians who want to participate in sport, both nationally and internationally that is free of doping. It seeks to promote those important life values that make sport an important part of cultural life, such as fair play, teamwork, dedication and friendship.

Right to protection from arbitrary or unlawful interference with privacy or family

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual’s privacy, family, home or correspondence, and protects a person’s honour and reputation from unlawful attacks. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to this purpose.

The collection, storage, use and disclosure of personal information relevant to an investigation under the NAD Scheme will, like many investigative powers, engage the right to privacy. The amendments to the NAD scheme that are required by the ASADA Act give the CEO the power to require a person to attend an interview, give information or produce documents or things if the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme.

As required by the ASADA Act, the Regulation authorises the CEO to require someone to do one or more of the above by giving the person a written disclosure notice (clause 3.26B of the Regulation). Inevitably, this will include personal information. Section 71 of the ASADA Act however, already provides for the protection of personal information obtained through the NAD scheme.

The NAD scheme provides that the CEO will be able to issue a disclosure notice to any person where the person is reasonably believed to have relevant information. This recognises that people outside the jurisdiction of Australia's sporting bodies may have information that is important in investigating anti-doping rule violations by athletes or support personnel. For example, a disclosure notice could be issued to someone who is involved in the supply of relevant substances to athletes or clubs.

The clauses around issuing disclosure notices are reasonable, necessary and proportionate to the legitimate aim of deterring, preventing and identifying doping cheats. Doping is potentially dangerous to the health of individuals. Undetected doping by one competitor can influence other competitors to follow suit in order to compete. It distorts the outcome and credibility of sporting contests and undermines the overall integrity of sport. This erodes the willingness of the community to participate in sport and the financial input of sponsors, all of which are vital to fostering sports at all levels.

The new measures are necessary as the detection of doping is becoming increasingly reliant on effective non-analytical investigations. ASADA has found that people with information that is important to an investigation into suspected anti-doping rule violations against an athlete or athlete support person, currently refuse to cooperate with the ASADA investigators.

It is conceivable that the CEO may need to seek evidence from a person who is a family member of an athlete under investigation. That may engage the limb of Article 17 relating to arbitrary or unlawful interference with family, insofar as there is a possibility that a person who is issued a disclosure notice may have relevant information about someone who is a family member.

The Scheme does not distinguish between persons from whom information, documents or things may be sought. This is because it is not possible to limit the class of persons who may possess information, documents or things that are important to resolving a doping investigation. Indeed, family members are often involved in an athlete's preparation, as a teammate, coach or in another supporting role. Any involvement of a family member will be in accordance with the many other conditions and protections that accompany the disclosure notice process; and will not be arbitrary or unlawful.

The new measures are proportionate. Enhancements to the NAD Scheme include:

- the option for the CEO to request assistance without issuing a disclosure notice (clause 3.26A);
- key rights and obligations must be set out in the disclosure notice (clause 3.26B);
- a minimum of 14 days notice of an interview, unless the Panel agrees that extraordinary circumstances exist which may require an earlier interview (paragraph 3.26B(6));

- the opportunity for the recipient of a notice requiring an interview to ask the CEO to consider changing the date, time or place on the grounds that it would cause undue hardship (sub-paragraph 3.26B(6)(c));
- the possibility of conducting the interview in person or electronically (paragraph 3.26C(2));
- the right of all interviewees to have a legal practitioner present (paragraph 3.26C(4));
- interviewees may have another person present who is not a legal practitioner, although if it is reasonably believed that the presence of that other person may compromise, hinder or obstruct an investigation – for example because the other person is a suspect or a witness themselves - then that person may not attend and the interviewee will be asked to nominate an alternative person (paragraph 3.26C(4)); and
- interviewees under 18 years of age may have a lawyer present and another person, to cater for the likelihood that a parent or guardian should be present, regardless of whether the person is legally represented (paragraph 3.26C(4)(b)).

Right to a fair trial

Article 14(1) of the ICPR provides a right to a fair trial in relation to the determination of a ‘suit at law’ or a ‘criminal charge’. The penalty provisions that exist under the ASADA Act are classified as civil penalties under Australian law. Civil penalties relate to non-compliance with a disclosure notice and the Act requires that any matter in which a breach was alleged would be determined by a court. A finding by a court that a person failed to comply with a civil penalty provision would not result in a criminal conviction. A penalty imposed becomes a debt payable to the Commonwealth.

The Regulation introduces an infringement notice scheme (Item 5 of Schedule 1). An infringement notice may be offered to someone who is alleged to have contravened a civil penalty provision, as an alternative to having the matter determined by a court. Importantly, a person retains the right to have a matter involving the alleged breach of a civil penalty provision determined by a court, should they wish.

The amount of a civil penalty that may be imposed in an infringement notice can be no more than one-fifth of what may be imposed by a court. The infringement notice scheme makes provision for a person to seek an extension of time to pay the penalty and to make written representations to the CEO seeking a withdrawal of the notice. Payment of the penalty is not an admission of guilt or liability.

Right to be free from self-incrimination

Article 14(3)(g) of the ICCPR provides that, in the determination of a criminal charge, a person may not be compelled to testify against him or herself or confess guilt. Although not used for the purposes of determining a criminal charge, a disclosure notice can compel a person to answer questions.

The Regulation reflects the self-incrimination provisions that are in section 13D of the ASADA Act by requiring at sub-paragraphs 3.26B(6)(f) and 3.26B(8)(a) that a disclosure notice must include a statement that an individual is excused from complying with a requirement to answer a question or to give information if the answer or the information might tend to incriminate the person or expose the person

to a penalty. These provisions echo those in the ASADA Act which protect a person from being compelled to testify against him or herself or to confess guilt.

A disclosure notice may require the production of documents or things and it is possible that those documents or things could incriminate the person who produced them. In the absence of a search and seizure power for ASADA, that capacity is necessary. Even so, subsection 13D(3) of the ASADA Act includes use immunity and derivative use immunity protections in respect of any documents or things so produced.

Documents or things produced in response to a notice, the producing of the document or thing, or any information, document or thing obtained as a direct or indirect consequence of producing the document or thing will be inadmissible as evidence against the person in criminal proceedings (except an offence against section 137.1 (false or misleading information) or 137.2 (false or misleading documents) of the Criminal Code).

They will also be inadmissible as evidence against the person in any other proceedings that would expose the individual to a penalty, other than proceedings under, or arising out of, the ASADA Act or regulations. These protections in the Act must be specified in a disclosure notice, pursuant to regulation 3.26B(9)(c).

Right to the presumption of innocence

Article 14(2) of the ICCPR states that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to the presumption of innocence is also a fundamental common law principle.

Laws which shift the burden of proof to the defendant can be considered a limitation of the presumption of innocence. This is because a defendant's failure to discharge a burden of proof or prove an absence of fault may permit their conviction despite reasonable doubt as to their guilt. This includes where an evidential or legal burden of proof is placed on a defendant.

None of the amendments to the ASADA Act or Regulations relate to criminal offences and it is not considered that they affect the burden of proof in any relevant sense, in any event.

Importantly, the introduction of the disclosure notice scheme does not shift the burden for proving an anti-doping rule violation from ASADA. In accordance with the World Anti-Doping Code (the Code), the burden of proof for establishing an anti-doping rule violation remains with ASADA at all times.

The only relevant area where an evidential burden is placed on a person is under the amended ASADA Act, is in relation to the production of information, document or thing requested through a disclosure notice.

Under section 73R of the ASADA Act, a person who is required to provide information, documents or things in a disclosure notice, and claims not to have them, will bear an evidential burden. However, provision is made under section 13C(2) of the ASADA Act for a person to provide a statutory declaration to the CEO in answer to such circumstances, in which case the relevant civil penalty provision will not apply. As those matters are within the knowledge of the person who is given the notice, the limited evidential burden imposed under the ASADA Act is considered reasonable and proportionate. The right of a person to provide a statutory declaration

in such circumstances is required to be included in a disclosure notice under the Regulation – see sub-paragraphs 3.26B(8)(c) and 3.26B(9)(c).